No. 32783 *Kanawha County Board of Education v. Johnny Sloan*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's decision to affirm the circuit court's order upholding the Grievance Board's finding that Mr. Sloan had committed immoral conduct, rather than sexual harassment, and reversing the Grievance Board's decision to impose only a three-day unpaid suspension as the appropriate discipline for such offense. I dissent, however, from the majority's decision for this Court itself to determine the appropriate discipline from the appellate level, rather than remanding this issue to the Grievance Board which, in its role as fact-finder, had, among other things, the benefit of observing witness demeanor to guide its determination of appropriate discipline. While I agree that the Grievance Board was clearly wrong in imposing a three-day unpaid suspension, a mere slap on the wrist for the serious offense committed, this finding does not, I believe, strip the Grievance Board of its discretion to determine a more appropriate punishment.

The Legislature has vested the Grievance Board with the responsibility to serve as fact-finder in employee grievance proceedings, including an employee's appeal of

disciplinary action taken by a local school board.[1] In its role as fact-finder, the Grievance Board necessarily must make credibility determinations which impact its conclusions as to the appropriate discipline for the offense or offenses committed. While this discretion is not unlimited, such as where the discipline is unduly light or harsh under the circumstances, this discretion is required to determine appropriate disciplinary sanctions.

A fact-finder, such as the Grievance Board, has the advantage of a three dimensional view of facts, including not just the black and white of what was said, but also witness demeanor and tone. On appeal, we are limited to a two-dimensional review of the facts as revealed in the written transcript of what was said, without the benefit of visually and audibly observing the witness' demeanor and tone.[2] As such, I believe it is more appropriate

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[1] W. Va. Code § 18A-2-8 (1990) authorizes an employee to appeal a school board's disciplinary action directly to a Level IV hearing before the Grievance Board.

[2] In the criminal law context, Justice Maynard has aptly summarized this principle, stating,

> sentencing, and especially whether to grant probation or not, is usually best left to trial judges. This is so for several reasons. Chief among them is the fact that the trial judge sees the defendant in person, interacts with him or her, can see the defendant's demeanor and attitude, and observes a hundred other subtle factors which enable the trial judge to determine the defendant's remorse or lack thereof. Since this Court never sees the defendant, we cannot make the same crucial observations. Therefore, absent some truly horrible mistake, I would leave criminal sentencing and probation decisions to the sound discretion of our very wise trial judges.

(continued...)

to remand this matter to the Grievance Board for the determination of the appropriate sentence in light of our determination that the discipline previously imposed was a grossly inadequate punishment in light of the severity of the offense committed. *See, e.g.*, *State v. Richardson*, 214 W. Va. 410, 416, 589 S.E.2d 552, 558 (2003) (Davis, J., concurring, in part, and dissenting, in part) (recognizing that determination of appropriate sentence to be imposed should ordinarily be determined by the trial court on remand, rather than at the appellate level).

Accordingly, I respectfully dissent from my colleagues' decision to determine the discipline to be imposed at the appellate level. I would, instead, have directed this matter be remanded to the Grievance Board for its reconsideration of the sentence to be imposed in light of our decision that the discipline previously imposed was inadequate.

[2](...continued)
State v. Arbaugh, 215 W. Va. 132, 151, 595 S.E.2d 289, 308 (2004) (*per curiam*) (Maynard, J., dissenting).